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No. 09-736

In the Supreme Court of the United States

STEVEN A. HUDSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
JEANNE E. DAVIDSON
TODD M. HUGHES
SHALOM BRILLIANT
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioners' home-to-work commutes in government-owned vehicles are compensable work under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, and Section 4(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. 254(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 575 F.3d 1332. The opinion of the Court of Federal Claims (Pet. App. 18a-52a) is reported at 83 Fed. Cl. 236.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2009. On October 22, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 18, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires that an employer

pay overtime compensation when it employs a non-exempt employee for a workweek longer than 40 hours. 29 U.S.C. 207(a), 213(a)(1). The Act does not define "work" or "workweek," and this Court's early cases construed the term "work" broadly as activity "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." See *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 25 (2005) (*IBP*) (citing *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590 (1944), *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944), and *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)). The substantial and unexpected scope of employer liability under those early decisions led Congress to enact the Portal-to-Portal Act of 1947 (Portal-to-Portal Act), 29 U.S.C. 251 *et seq.*, to narrow the coverage of the FLSA. See *IBP*, 546 U.S. at 26-27, 41.

As is relevant here, Section 4(a) of the Portal-to-Portal Act relieves employers from FLSA overtime liability for the following employee activities, unless such activities are compensable under a contemporaneous contract or "custom or practice" in effect at the place of employment (29 U.S.C. 254(b)(2)):

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or sub-

> sequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a).

Regulations promulgated by the United States Department of Labor (DOL) and Office of Personnel Management (OPM) explain that "[a]n employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel, which is a normal incident of employment" and "not worktime." 29 C.F.R. 785.35; see 5 C.F.R. 551.422(b); 29 C.F.R. 790.7(c). Such home to work travel, however, does not encompass an employee's transit to a work site that occurs after the employee has traveled from his home to an employer-specified location and started to perform the day's work. Where an employee is "required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place" is compensable as work. 29 C.F.R. 785.38.

2. Petitioners are four individuals who have been employed by the Bureau of Alcohol, Tobacco and Firearms and components of the Department of Homeland Security, and who brought suit in the Court of Federal Claims alleging that the government failed to pay them overtime compensation as required by the FLSA. Pet. App. 2a, 18a. The parties subsequently settled all of the claims except the claim that time spent commuting between home and work in a government vehicle was work subject to overtime compensation. Pet. 9-10. Proceedings with respect to the commuting time claim were stayed pending appellate review in another case, in which the home-to-work driving of several thousand law enforcement officers was ultimately held not compensa-

ble under the FLSA. Pet. App. 20a; see *Adams* v. *United States*, 65 Fed. Cl. 217 (2005), aff'd, 471 F.3d 1321 (Fed. Cir. 2006), cert. denied, 128 S. Ct. 866 (2008). The stay was lifted after the petition for a writ of certiorari in *Adams* was denied. Pet. App. 21a-22a.

Thereafter, upon the government's motion, the Court of Federal Claims entered summary judgment dismissing the commuting time claims in this case. Pet. App. 18a-52a. The court explained that this result was compelled by circuit precedent established in *Adams* and in *Bobo* v. *United States*, 136 F.3d 1465 (Fed. Cir. 1998). The court observed that here, as in *Adams*, the plaintiffs' claim was limited by stipulation to time solely spent driving between home and work, and that, under *Bobo* and *Adams*, "commuting done for the employer's benefit, under the employer's rules, is noncompensable if the labor beyond the mere act of driving the vehicle is *de minimis*," Pet. App. 20a (quoting *Adams*, 471 F.3d at 1328). The plaintiffs had failed to identify any material difference between their home-to-work driving and the home-to-work driving that had been held non-compensable in *Bobo* and *Adams*. *Id.* at 30a-34a.

3. The court of appeals affirmed. Pet. App. 1a-17a. Describing the dispute in this case as "identical in all material respects to the dispute" in *Adams* and as "similar to the dispute" in *Bobo*, *id.* at 1a, the court endorsed the lower court's conclusion that the case was controlled by *Bobo* and *Adams*, and rejected the appellants' argument that those decisions were either distinguishable or not binding.

In *Bobo*, the court had addressed a claim by Border Patrol dog handlers who were required to transport their dogs with them while commuting to and from work, and, for this purpose, were required to commute in spe-

cial government vehicles, subject to certain requirements and restrictions. Pet. App. 2a-3a. To determine whether the dog handlers' home-to-work commute constituted compensable work as "an integral and indispensable part of the principal activities" for which they were employed, *Bobo* adopted the Second Circuit's approach of examining a plaintiff's commuting activity in light of the degree to which the "activity is undertaken for the employer's benefit," the degree to which it is "indispensable * * * to the primary goal of the employee's work," and the degree of "choice the employee has in the matter." 136 F.3d at 1467 (quoting *Reich* v. *New York City Transit Auth.*, 45 F.3d 646, 650 (2d Cir. 1995)). Where the employee's work activity during the commute "is truly minimal, it is the policy of the law to disregard it." *Ibid.* (quoting *Reich*, 45 F.3d at 650). The *Bobo* court held that, while compulsory restrictions were placed on the dog handlers' commutes that benefitted the Border Patrol and were closely related to the employees' principal work activities, those restrictions were negligible as a whole because their impact was "infrequent, of trivial aggregate duration, and administratively impracticable to measure." *Id.* at 1468.

In *Adams*, the court addressed the claim of several thousand law enforcement officers who were required to commute in government vehicles subject to certain restrictions, and to keep their weapons and other job-related equipment with them during their commutes. Pet. App. 4a. Following the analysis in *Bobo*, the court in *Adams* held that the appellants' commuting time was similarly not compensable under the FLSA. *Ibid.* (citing *Adams*, 471 F.3d at 1326-1328).

In light of *Bobo* and *Adams*, the court of appeals here stated that its task was "mainly to determine

whether there is any reason for us to distinguish or depart from the *Adams* and *Bobo* decisions." Pet. App. 1a. The court found no such reason. Finding no merit in petitioners' contention that the earlier decisions were at odds with decisions of this Court and with relevant regulations and administrative interpretations, *id.* at 8a-16a, and finding that petitioners had offered no factual distinction justifying a different result here than in *Bobo* and *Adams*, *id.* at 16a-17a, the court affirmed the dismissal of petitioners' home-to-work driving claims. *Id.* at 17a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In 2008, this Court denied a petition for a writ of certiorari in *Adams*, which was "identical in all material respects" to this case. Pet. App. 1a. No events in the intervening years require a different result, and the Court should deny the petition for a writ of certiorari on this matter again.

1. The court of appeals correctly determined that petitioners are not entitled to overtime compensation for commuting between home and work with government vehicles.

Section 4(a)(1) of the Portal-to-Portal Act distinguishes between an employee's time spent on principal "work" activities (that is, the "principal activity or activities which [an] employee is employed to perform"), for which the FLSA requires overtime pay, and noncompensable time spent "traveling to and from the actual place of performance" of such "principal activity or activities" before the employee's principal work activities begin or after they cease. 29 U.S.C. 254(a)(1). This

Court has held that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a) of the Portal-to-Portal Act." *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 37 (2005) (citing *Steiner* v. *Mitchell*, 350 U.S. 247 (1956)).

This Court has also held, however, that "the fact that certain preshift activities are *necessary* for employees to engage in their principal activities *does not mean* that those preshift activities are 'integral and indispensable' to a 'principal activity.'" *IBP*, 546 U.S. at 40-41 (emphases added). All home-to-work commutes are "necessary" for an employee to perform the principal activity for which he is employed, yet it is undisputed that an employee's normal commute is not compensable under the FLSA. Cf. 29 C.F.R. 785.35, 790.7(c); cf. also 5 C.F.R. 551.422(b). Even before Congress enacted the Portal-to-Portal Act to restrict the FLSA's application to travel time, this Court indicated that "traveling from workers' homes to [the workplace]" does not qualify as "work"—that is, activity both "controlled or required by the employer" and "pursued necessarily and primarily for the benefit of the employer and his business." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 691-692 (1946) (citation omitted); *IBP*, 546 U.S. at 25; cf. *Reich* v. *New York City Transit Auth.*, 45 F.3d 646, 651-652 (2d Cir. 1995) (applying this "concept of compensable work" to resolve a dispute over home-to-work commuting).[1] A home-to-work commute primarily benefits the

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[1] The travel time that the Portal-to-Portal Act excludes from compensation includes travel *within* the employer's premises, *i.e.*, travel much more closely related to the employee's work than commuting. As his Court noted in *IBP*, "walking from a time-clock near the factory gate to a workstation is certainly necessary for employees to begin their work, but it is indisputable that the Portal-to-Portal Act evinces

employee because it accommodates the employee's choice of where to live; its duration is determined by that personal choice; and, when an employee elects to live farther from work (and accept a longer commute), that choice does not benefit the employer or his business.[2]

In some circumstances, an employee may perform significant activities during a home-to-work commute that sufficiently alter its character to make it an "integral and indispensable" part of the employee's primary work activity that primarily benefits his employer. The court of appeals, like its sister circuits, has thus properly evaluated commuting-based overtime claims by weighing the degree to which activities associated with the employee's home-to-work travel are "undertaken for the employer's benefit," the degree to which they are "indispensable * * * to the primary goal of the employee's work," and the degree of "choice the employee has in the matter." *Bobo* v. *United States*, 136 F.3d 1465, 1467-1468 (Fed. Cir. 1998) (quoting *Reich*, 45 F.3d at 650). Moreover, where the work-related aspects of an employee's commute are negligible in light of the commute's normal benefit to the employee, the courts of

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Congress' intent to repudiate *Anderson*'s holding that such walking time was compensable under the FLSA." 546 U.S. at 41.

[2] While petitioners assert (Pet. 21) that "even a significant, direct benefit to the employee" will not make an activity non-compensable under *IBP* and *Steiner*, neither case addressed the process of distinguishing between activities that primarily benefit the employer and those that do not. See *IBP*, 546 U.S. at 25, 32 (noting rule that activity must be "primarily for the benefit of the employer" to constitute compensable work in case where litigants did not challenge ruling that donning and doffing unique protective gear was an "integral and indispensable" part of employees' principal work activity); *Steiner*, 350 U.S. at 252, 256 (no challenge to similar ruling).

appeals have held the time spent in such commutes to be non-compensable. See *Adams*, 471 F.3d at 1327; *Bobo*, 136 F.3d at 1468; *Reich*, 45 F.3d at 650, 652-653 (commuting by dog handlers required to transport their dogs between home and work was not compensable where work-related duties during commute were "neither substantial, nor regularly occurring"); *Aiken* v. *City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999) (following *Bobo* and *Reich* and holding that commutes by K-9 officers required to transport their dogs between home and work in city vehicles are not compensable where no "more than a de minimis amount of time during their commutes" was spent on work activities), cert. denied, 528 U.S. 1157 (2000).

2. Petitioners do not dispute that the decision of the court of appeals here was supported by its prior decisions in *Bobo* and *Adams*. Rather, petitioners argue that the Federal Circuit misconstrued the FLSA and the Portal-to-Portal Act in those cases, and, therefore, erred here as well by following those cases. Petitioners are incorrect.

a. Petitioners contend (Pet. 14-16) that in these cases the Federal Circuit applied a test for determining whether travel is a "principal activity" under Section 4(a)(1) of the Portal-to-Portal Act that is different than the test for determining whether preliminary or postliminary activities are "principal activities" under Section 4(a)(2). They further contend that this "two-tiered approach to Section 4(a)" erroneously makes driving that is an "integral and indispensable" part of a principal work activity non-compensable unless an employee also performs other work while driving. Pet. 12, 16. Petitioners mischaracterize the Federal Circuit's analysis. Nothing in that court's decisions suggests that it

interprets "principal activities" in Section 4(a)(1) differently from the same term in Section 4(a)(2). Both here and in *Adams* the court applied its prior decision in *Bobo* to the facts of the case, and *Bobo* expressly invoked this Court's ruling in *Steiner* that an activity is compensable under Section 4(a) when it is "an integral and indispensable part of the principal activities for which covered workmen are employed." *Bobo*, 136 F.3d at 1467 (quoting *Steiner*, 350 U.S. at 256).

The court of appeals applied the correct legal standard, but it did not accept petitioners' contention that their particular commutes were an "integral and indispensable part" of their principal work activities. Significantly, in this case (as in *Adams*), the commuting time claim was presented for adjudication after the dismissal, pursuant to a settlement, of all relevant FLSA claims other than those for time *solely* spent driving a government vehicle between home and work. Pet. App. 29a-30a. Therefore, any time petitioners spent performing work-related activities in addition to such driving are not at issue here.

The only question before the court of appeals was whether petitioners should be compensated for driving to and from their homes in government vehicles. The court accepted that the *restrictions* placed upon the employees' commutes, *i.e.*, that they not make personal stops, were compulsory, for the benefit of the agency, and closely related to the employees' principal work activities, but found these restrictions to be "insufficient to pass the *de minimis* threshold," Pet. App. 3a (quoting *Bobo*, 136 F.3d at 1468); see *Adams*, 471 F.3d at 1327. These restrictions, therefore, were insufficient to render personal commutes an "integral and indispensable part" of their principal work activities.

Petitioners' misreading of the test applied by the Federal Circuit appears to stem from their dwelling upon the *Adams* court's statement, paraphrasing the holding in *Bobo*, that "commuting done for the employer's benefit, under the employer's rules, is noncompensable if the labor beyond the mere act of driving the vehicle is *de minimis*." *Adams*, 471 F.3d at 1328. See Pet. 8, 12, 15. From this, petitioners appear to assume that the court found the commuting in question to have been done for the employer's benefit and as a requirement of employment. Neither this case, *Adams*, nor *Bobo*, however, involve a requirement that employees commute, nor do they involve a benefit to the government from the employees' commuting. The requirement in question is only that when the employees commute, they utilize government vehicles for this purpose. And, the benefit to the government mentioned in *Adams* and *Bobo* was not a result of the commuting, but of the fact that the vehicle was available for response to emergencies, *Adams*, 471 F.3d at 1323, or for transporting dogs, *Bobo*, 136 F.3d at 1466-1467. Thus, petitioners' commuting time is not an integral and indispensable part of their principal activities. In any event, the question whether petitioners' commutes constitute an integral and indispensable part of their principal activities involves application of a settled legal standard to their particular factual situation and does not merit this Court's review.

b. Petitioners argue (Pet. 16-25) that review is warranted to resolve a circuit conflict over the proper application of Section 4(a)(1). No such conflict exists.

First, to the extent that the purported conflict concerns the so-called "two-tiered approach to Section 4(a)," Pet. 16, petitioners' argument stems from their

misreading of the Federal Circuit's decisions. As noted above, the Federal Circuit did not adopt the approach petitioners attribute to it. Second, while petitioners acknowledge that two circuits are in agreement with the Federal Circuit (Pet. 16 (citing *Aiken*, 190 F.3d at 758 and *Rutti* v. *LoJack Corp.*, 578 F.3d 1084 (9th Cir. 2009)), petitioners fail to cite *any* precedential decision from *any* circuit holding home-to-work driving to be compensable work under the FLSA. Instead, petitioners rely upon decisions in which activities *other than* commuting were held to be compensable, and decisions in which commuting time was held *non*-compensable for reasons that, according to petitioners, make those decisions distinguishable.

A number of the decisions upon which petitioners rely conclude that an employee performs an integral and indispensable part of his principal work activity when driving his employer's vehicle between the employer's staging area and a work site in order to transport heavy equipment, tools, or supplies essential for performing his and others' job duties at the site.[3] One reflects that

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[3] See, *e.g.*, *Secretary of Labor* v. *E.R. Field, Inc.*, 495 F.2d 749, 750-751 (1st Cir. 1974) (electrician hired to work at construction site works when driving employer's truck to transport necessary tools and equipment from employer's shop to jobsite); *Mitchell* v. *Mitchell Truck Line, Inc.*, 286 F.2d 721, 723-725 (5th Cir. 1961) (truck drivers hired to deliver construction materials work when driving trucks from employer's truck yard to loading facility and when returning to yard after dropping load at destination); *DA&S Oil Well Servicing, Inc.* v. *Mitchell*, 262 F.2d 552, 554-555 (10th Cir. 1958) (employees hired to perform services at oil well work when driving trucks that transport necessary heavy equipment back from well site to employer's base); cf. *Bonilla* v. *Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir.) (discussing unpublished and non-precedential decision holding that employees work when driving vehicles that transport necessary

travel at the end of the day necessary to maintain the tools used to do the employee's principal work can be compensable.[4] The issues implicated by an overtime claim based on circumstances materially similar to home-to-work commuting were thus never addressed or decided in those decisions, which themselves recognize that overtime claims are highly contextual and "must be decided upon [their] peculiar facts." See, *e.g.*, *DA&S Oil Well Servicing, Inc.* v. *Mitchell*, 262 F.2d 552, 554-555 & n.4 (10th Cir. 1958); accord *Baker* v. *Barnard Constr. Co.*, 146 F.3d 1214, 1218-1219 (10th Cir. 1998) (*Barnard Constr.*).[5]

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tools from employer's lot to work site), cert. denied, 552 U.S. 1077 (2007). The same result holds true when an employee must transit from one employer-specified location to another in the middle of the workday. See *United Transp. Union Local 1745* v. *City of Albuquerque*, 178 F.3d 1109, 1118-1119 (10th Cir. 1999).

[4] See *Baker* v. *Barnard Constr. Co.*, 146 F.3d 1214 (10th Cir. 1998). *Baker* held that welders hired to perform welding services at a worksite must be compensated for the "travel time associated with refueling and restocking the welding rigs" if such travel is proven to be an integral and indispensable part of their principal work activity, *id.* at 1215-1217, and that a jury must decide whether it was necessary "to transport the rigs from the work site each day to refuel and restock" or whether such maintenance could be performed on site. *Id.* at 1219. Because *Baker* concerned only "whether the travel associated with refueling and restocking the rigs" is compensable work, *ibid.*, it did not address whether a welder must be compensated for his commute home if he drives there after refueling and restocking.

[5] The Ninth Circuit, in a unpublished decision, has ruled that work foremen who were employed to drive their specially equipped company trucks to an out-of-town jobsite in order to transport equipment, tools, and crew members to the site each day must be compensated for driving the trucks back to town (often to their homes) because their employer required that they drive the trucks away from the worksite and prohibited them from returning the trucks to the company office in

Petitioners (Pet. 22) also rely upon two Second Circuit decisions in which the commuting in question was held *non*-compensable: *Singh* v. *City of New York*, 524 F.3d 361 (2008) (Sotomayor, J.), and *Reich*. Petitioners argue that the employer requirements associated with the commuting in those cases were less significant than those involved here,[6] and they speculate that under facts closer to those involved here, the Second Circuit would reach a contrary result. There is no basis for a writ of certiorari to resolve a conflict between the decision of the Federal Circuit and hypothetical future decisions of the Second Circuit. Petitioners also argue that in *Singh* and *Reich* the Second Circuit did not apply the two-tier test that petitioners attribute to the Federal Circuit. As noted, however, the Federal Circuit did not apply such a test. It applied the same test as did the Second Circuit, to facts that were somewhat different from the facts in the Second Circuit cases, and reached the same result as did the Second Circuit. This is not a conflict between circuits.

c. Petitioners argue (Pet. 26-29) that the Federal Circuit's construction of the FLSA and the Portal-to-Portal Act conflicts with that of DOL. The court of ap-

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town. See *Dole* v. *Flint Eng'g & Constr. Co.*, 914 F.2d 262 (1990) (Table). That decision is consistent with the outcome in this case, and, in any event, would not give rise to a circuit conflict warranting this Court's review because it has no precedential effect for future cases. See 9th Cir. R. 36-3(a).

[6] Petitioners also exaggerate the difference. For example, they stress that in *Reich*, unlike in *Bobo*, "'the handlers were not required to drive,' at all." Pet. 23 (quoting *Reich*, 45 F.3d at 651). In the sentence from which petitioners quote, however, the court also stated that the handlers' commute was required to be in a private vehicle. As a practical matter, unless the handler had someone to drive him, he was required to drive.

peals considered and rejected this argument, correctly concluding in this case that *Bobo* and *Adams* were consistent with the pertinent regulations and interpretations issued by OPM, and that these, in turn, were consistent with those of DOL. Pet. App. 11a-16a.[7] The court noted that under OPM's regulations, "an employee 'who travels from home before the regular workday begins and returns home at the end of the workday is engaged in normal "home to work" travel; such travel is not hours of work,'" *Id.* at 11a (citing 5 C.F.R. 551.422(b)), and that, likewise, "Section 553.221(e) of the Labor Department regulations, 29 C.F.R. § 553.221(e), establishes the baseline principle that '[n]ormal home to work travel is not compensable.'" *Id.* at 13a (citing 29 C.F.R. 785.35). Petitioners fault the court of appeals for treating the latter regulations as "aces of trump," Pet. 26, and argue that the cited language does not mean that all home to work travel is non-compensable. The regulations do mean, however, that home to work travel is not compensable in the absence of additional requirements that turn the travel time into compensable work, and none of the DOL regulations upon which petitioners rely states that the requirements of the kind involved here are sufficient to do so.[8]

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[7] Congress authorized OPM to administer the FLSA in the Federal sector. See 29 U.S.C. 204(f); see also H.R. Rep. No. 913, 93d Cong., 2d Sess. 28 (1974) (indicating Congress wanted Civil Service Commission (OPM's predecessor) to administer the FLSA in a manner generally consistent with the interpretations adopted by DOL in other sectors of the economy); *Billings* v. *United States*, 322 F.3d 1328, 1333-34 (Fed. Cir.), cert. denied, 540 U.S. 982 (2003).

[8] See, *e.g.*, 29 C.F.R. 790.7(d) ("carrying by a logger of a portable power saw or other heavy equipment * * * on his trip into the woods to the cutting area" is not covered by Section 4(a)); 29 C.F.R. 785.41

As petitioners note, OPM did at one time issue guidance which could be construed as supporting petitioners' position. Pet. 5 (citing Federal Personnel Manual Letter No. 551-10 (Apr. 30, 1976)). However, OPM withdrew that guidance when it abolished its Manual in 1993 (effective 1994). See *Nebblett* v. *OPM*, 237 F.3d 1353, 1358 (Fed. Cir. 2001). OPM's superseding guidance states that commuting time "may be hours of work to the extent that the employee is required to perform substantial work under the control and direction of the employing agency," but that "[t]he fact that an employee is driving a Government vehicle in commuting to and from work is not a basis for determining that commuting time is hours of work." OPM, *Hours of Work for Travel* (visited Feb. 17, 2010) <http://www.opm.gov/oca/worksch/html/travel.asp>. This agency guidance is not inconsistent with any applicable regulation or interpretation issued by either DOL or OPM, and, as the court of appeals observed, it "is an authoritative interpretation that warrants deference." Pet. App. 12a (citing *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)).

d. Petitioners contend (Pet. 30-32) that the court of appeals applied a *de minimis* threshold in this case contrary to this Court's decision in *Anderson*. That contention does not bear scrutiny or merit this Court's review.

("work" required to be performed while traveling is compensable; employee whose "work" is to drive a vehicle or ride in one as a helper is working while riding); Wage & Hour Div., U.S. Dep't of Labor, *Field Operations Handbook* § 31d (May 30, 1986) <http://www.dol.gov/whd/FOH/index.htm> (addressing "special problems" applicable to employees employed to drive ambulances); *id.* § 31d00(a)(5). As the court of appeals noted, the cited Handbook's discussion of the "special problems" concerning ambulance drivers "cannot simply be extrapolated to all public servants who are required to use their official vehicles for commuting." Pet. App. 14a.

Anderson concluded that "negligible" amounts of time performing work activities "may be disregarded" as *de minimis* under the FLSA. 328 U.S. at 692. "It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." *Ibid.*

Nothing in *Anderson* suggests that this is the only way in which a "*de minimis*" concept might have relevance. In this case, the petitioners engaged in activity—commuting to and from work—that is normally not compensable. They received a government car in which to conduct this activity, on certain conditions, including that they not make personal stops during their commute. Especially in light of the valuable benefit received, a reasonable "restriction on their use of a government vehicle during their commuting time," *Bobo*, 136 F.3d at 1468, was a *de minimis* one that did not transform their entire commute into work. Cf. 29 C.F.R. 785.17 (on-call employee who uses time for own purposes is not working). Abiding by this restriction is not a service to the employer, and it has no effect upon the nature or length of the time petitioners spend driving between home and work, other than to prevent that time from being interrupted or lengthened for purposes other than commuting. The court of appeals properly held that "such a restriction on their use of a government vehicle during their commuting time does not make this time compensable." Pet. App. 4a (quoting *Bobo*, 136 F.3d at 1468).

e. The court of appeals correctly held that the plaintiffs had the burden of proof with respect to whether the activity in question constituted compensable work under the FLSA. Pet. App. 15a n.1; *Adams*, 471 F.3d at 1325-1326. In so holding, the court here and in *Adams* relied

upon this Court's statement in *Anderson* that "[a]n employee who brings suit * * * for unpaid minimum wages or unpaid overtime compensation * * * has the burden of proving that he performed work for which he was not properly compensated." 328 U.S. at 686-687. As the *Adams* court explained, "[t]he burden to prove that such work was performed necessarily includes the burden to demonstrate that what was performed falls into the category of compensable work." 471 F.3d at 1326 (citing *Barnard Constr.*, 146 F.3d at 1216).

Petitioners argue (Pet. 32-33) that the Portal-to-Portal Act is an "exception" to the FLSA overtime requirements and that, therefore, the employer has the burden of proving that plaintiffs' commuting time falls within the Portal-to-Portal Act. As the court here and in *Adams* correctly recognized, however, the compensability of the driving in these cases did not turn upon an exception, but upon whether the driving constituted compensable work at all. *Anderson* held that the employees bear the burden of proof on that question.

Implicit in petitioners' argument is that everything an employee does is presumed to be compensable work if the employee so characterizes it, and that it is the employer's burden to prove the characterization wrong. There is no basis for this premise. Consistent with this court's teaching in *Anderson*, the court of appeals correctly assigned to petitioners the burden of proving that they were performing compensable work while commuting.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
TODD M. HUGHES
SHALOM BRILLIANT
Attorneys

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